

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA * Case No. 17-CR-00281(ERK)
 *
 * Brooklyn, New York
 * January 18, 2018
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 *
CARLOS RICHARD MARTINEZ, *
 *
 * Defendant.
 *
* * * * * *

TRANSCRIPT OF CRIMINAL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 (Proceedings commenced at 10:23 a.m.)

2 THE CLERK: Counsel, please approach. Judge Korman
3 is on the phone. Attorneys are present, Judge.

4 THE COURT: Yes. I've been delayed a little bit this
5 morning. I can be there within 15 to 20 minutes but I wanted
6 to deal with this now. For the moment, we could hold Maria's
7 testimony up in response to the jury note. Did you read the
8 jury note into the record, Paula?

9 THE CLERK: The third jury note, which will be marked
10 Court Exhibit 19, Maria's testimony, Danilda's testimony,
11 Exhibit 225 and Exhibit 226.

12 (Court's Exhibit 19 marked for identification, as of today's
13 date)

14 THE COURT: And what were the other two jury notes?
15 Oh, that was from last night that they wanted to go home? I
16 don't --

17 THE CLERK: No, Judge, they've already been marked
18 into evidence on the record with counsel's consent. The first
19 jury note is Court Exhibit 14, requesting the Riley testimony
20 and the second jury note was Court Exhibit 16, requesting
21 Exhibits 241, 242-1 and 207. Counsel signed off on the note
22 and consented to those being sent into the jury last night.

23 THE COURT: Oh, okay.

24 I read your letter, Mr. Ricco. I am not sure -- when
25 I ruled that you could get your -- the testimony you wanted in,

1 notwithstanding the government's objection that somewhere else
2 in the transcript she gave testimony that could be read the
3 other way, my feeling was if she testified one way or if she
4 testified in two alternative ways, you were entitled to impeach
5 one of those ways. I am not sure I understand the basis for
6 your argument now.

7 I mean you pointed to one thing in the transcript
8 that supported your view. They pointed to another aspect of
9 the testimony that said well, she was mistaken when she said
10 that. I wasn't going to decide whether she was mistaken when
11 she said that or not but you were entitled to impeach what you
12 say she said, by then you describe quite accurately. I mean
13 this is basically what juries are to decide. I am not sure why
14 I should stop deliberations or what I should do.

15 MR. RICCO: Well, Judge, I don't disagree with what
16 the Court is saying. I was a little troubled by the way in
17 which the argument was advanced and I thought about it and it
18 troubled me.

19 And I started writing a submission on it and --

20 THE COURT: Tell me orally why you were troubled?
21 I'm just not clear because --

22 MR. RICCO: Because I think what --

23 THE COURT: -- she missed -- go ahead.

24 MR. RICCO: I think what the government did in its
25 rebuttal summation is that they said with respect to Attorney

1 Kluger, that the jury doesn't have to be concerned with that
2 testimony because as they pointed to page 274, the testimony in
3 this case is that she was talking about another lawyer and the
4 government said not Mr. Kluger.

5 That's not an accurate statement of the record and I
6 recognize that the government has a right to point to those
7 parts of the transcript that it thinks supports its case, just
8 as we do but I believe that when the government has the
9 rebuttal summation, that great care has to be exercised in how
10 they make arguments as to what the record represents.

11 And my view is that the impression that was left with
12 the jury was that pages 274 of the transcript is what the
13 record represents on this subject and that's not true.

14 So to me, there's a difference between advocacy and
15 then when you come very dangerously close to the line, you
16 know, I believe that the United States Attorney's Office has --
17 and not just myself, I mean the Supreme Court has said, has a
18 special relationship to criminal proceedings and that is
19 because jurors take the imprimatur of the office and have --
20 the prosecutors have to be guided by that.

21 I mean we spent years, you know, relitigating Ronell
22 Wilson in this case because of a comment that was made in
23 summation. And I was troubled by the comment. Now a lot of
24 said was things I disagreed with or, you know, but that's not
25 the point. The only point that I am referring to is this

1 particular --

2 THE COURT: I'm sorry, but you in your summation
3 referred to the testimony of Kluger that I --

4 MR. RICCO: I did.

5 THE COURT: -- recall -- and you can correct me if I
6 am wrong.

7 MR. RICCO: No question, Judge, I did. I checked the
8 transcript.

9 THE COURT: You said what he said and I don't know
10 whether you were going through at some page what or whatever
11 but the way the government was but no jurors were taking notes
12 during the summation. I was just interested that they were all
13 listening and notwithstanding --

14 MR. RICCO: And, Judge, let me tell you what I am --

15 THE COURT: -- notwithstanding the government's
16 PowerPoints with the citations and everything for the record,
17 nobody was taking notes.

18 MR. RICCO: Judge, let me just say what troubles me
19 less. What troubles me less is that the jurors will have the
20 transcripts and they --

21 THE COURT: Well --

22 MR. RICCO: -- can decide and read them for
23 themselves, as they're required to.

24 THE COURT: Right.

25 MR. RICCO: And my concern is that the comments that

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1 were made, I thought sort of went across the line, particularly
2 given a rebuttal summation. If the Court disagrees with that,
3 I am okay with that.

4 THE COURT: What is this --

5 MR. RICCO: I was just troubled by it and decided to
6 write to the Court about it, for the Court to take a look at
7 it.

8 THE COURT: Tell me again her exact words that you're
9 troubled by.

10 MR. RICCO: It's in the transcript, Judge, at page
11 1509. Oh, you don't have the transcript.

12 THE COURT: Yeah.

13 MS. ARGENTIERI: Judge, can I be heard?

14 MR. RICCO: Well, I think the judge just asked me a
15 question and I would like to answer it before you can be heard,
16 if you don't mind.

17 THE COURT: Yeah, let him finish. I thought in your
18 letter you were quoting from the transcript.

19 MR. RICCO: I was. So it's in the letter, Judge,
20 it's right from the transcript.

21 THE CLERK: And he was quoting you a page from the
22 transcript that you don't have, Judge.

23 MR. RICCO: Right.

24 THE COURT: I know but do you have it?

25 THE CLERK: Yes.

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1 MR. RICCO: Yes.

2 THE COURT: Then read it to me.

3 MR. RICCO: Okay.

4 THE COURT: I read your letter but --

5 MR. RICCO: It says --

6 THE COURT: -- I can't get it on my iPhone on -- for
7 some reason --

8 MR. RICCO: It says --

9 THE CLERK: He has it, Judge.

10 MR. RICCO: I have it, Judge. Can I see the
11 transcript, so I can read it accurately?

12 MS. SHIHATA: Sure, you can have my copy.

13 MR. RICCO: Okay, thank you.

14 MS. ARGENTIERI: Can we have the other copy, I
15 mean --

16 MR. RICCO: And, Judge, I just asked the prosecution
17 for the transcript, so I can read it accurately to you. Okay.
18 At line 13 they say:

19 "Ms. Shihata: Defense counsel also said something
20 about how Mr. Kluger's testimony means that Maria was lying
21 about Torres or his people calling her lawyer. Let's look at
22 the transcript again. Page 274, line 17.

23 "Question: Okay. And by the way, you also wasn't
24 honest with your own lawyer. Isn't that correct?

25 "Answer: No, That was my -- we're talking about my

1 family's life. The other lawyer told me that they were calling
2 him."

3 The other lawyer told me that -- the other lawyer
4 told me that they were calling him and the government says, not
5 Mr. Kluger. In other words, the last sentence I read is not
6 reading from the transcript. And then they went onto talk
7 about there's this immigration lawyer and how this -- it's
8 different.

9 So that's really it. You know, it seems very
10 innocuous. At the time it came in it troubled me and it
11 continued to trouble me when I went home. And my concern,
12 Judge, is that I am sort of on this record reluctant to consent
13 to his testimony going back because if there are jurors who
14 believe that this is the place in the transcript where this
15 information is, they may not be -- they may not take the time
16 to look elsewhere based upon this presentation.

17 Now we have to consent to this and I am troubled by
18 it in the traditional sense if jurors had questions about this,
19 they would send us a note and we would then find the places in
20 the transcript where this conversation existed and then we
21 would be assured that they had the accurate -- they had the
22 transcripts with them.

23 So I thought about that as far as a remedy and even
24 though we're sending the transcripts into the jury, I don't
25 think either side is prejudiced by a statement from the Court

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1 that during summation, you may have heard a lot of references
2 to pages. It's you -- you the jurors are not bound by either
3 side's reference to pages. Your job is to review the record in
4 your deliberations and find information that you deem
5 appropriate to make the ultimate decisions that you have to
6 make.

7 Now that type of innocuous instruction doesn't
8 prejudice anyone. It doesn't point to anyone. It could be
9 done before several transcripts go in. And I think that given
10 this record and this issue, I requested it.

11 THE COURT: Well, I did instruct them in the main
12 instructions with what the lawyers say is not evidence. I
13 mean, I may have said it during the trial too at some point for
14 some reason.

15 MR. RICCO: You did, Judge.

16 THE COURT: But it was --

17 MR. RICCO: And I'm satisfied that you've done that.

18 THE COURT: And I believe it's -- it's certainly in
19 the charge. It's part of my charge and I say when they -- I
20 say it before the summations begin, actually.

21 MS. ARGENTIERI: Judge?

22 THE COURT: I believe that there's a statement in my
23 instructions that arguments or statements by lawyers are not
24 evidence. I believe it's in the main instruction.

25 MR. RICCO: I think that that's right, Judge.

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1 THE COURT: Well --

2 MR. RICCO: I don't disagree with that. You know, I
3 would tell the Court that I was troubled by it. It's not a --
4 it's just one of those issues that sort of hit you in the side
5 and makes you think and you're just trying to make sure you're
6 doing the right thing. There's no malice or anything in this
7 kind of application.

8 THE COURT: All right.

9 MR. RICCO: It's just the kind of care that you take
10 when you represent people. You want to make sure that that
11 record is an accurate reflection of what it is we're doing and
12 the right result is being reached.

13 MS. ARGENTIERI: Judge, just so we could sort of make
14 a record of our response, although -- Ms. Shihata's comments
15 during rebuttal as Mr. Ricco just read were telling the jurors
16 they should draw an inference from testimony. And she actually
17 put up the testimony and showed it to them.

18 And you're correct, Judge, in your recollection that
19 Mr. Ricco did the same thing in his summation and that's what
20 argument is. It's both sides --

21 THE COURT: But he didn't put up a picture, did he?
22 I don't --

23 MS. ARGENTIERI: He didn't but that was his choice,
24 Judge. And honestly, the government came nowhere close --

25 THE COURT: Sorry, I didn't mean to interrupt you. I

1 just want to be clear that --

2 MS. ARGENTIERI: That's okay but he directed them to
3 that and he characterized the testimony and I think you're also
4 correct, Judge, that when we were at sidebar, you in no way
5 said that the government couldn't make that argument. It was a
6 proper argument to make.

7 And look, a lot of things are said during argument.
8 The government's argument here --

9 THE COURT: I didn't say you couldn't make the
10 argument. I didn't think that your basis for objecting to his
11 -- to what he wanted to admit was simply, you know, without
12 merit. So let's assume that your view of the transcript, her
13 testimony is one way and his view is certainly supported by her
14 testimony which is the other way, am I going to stop him from
15 impeaching -- in effect, impeaching her testimony, this
16 version, what he believes is untrue about her testimony by
17 calling Kluger? I mean, to me it was not a close question. I
18 didn't even know why you --

19 MS. ARGENTIERI: Well, I objected, Judge. I'm not
20 trying to reargue it.

21 THE COURT: No, don't reargue it.

22 MS. ARGENTIERI: No, I --

23 THE COURT: I don't need you to --

24 MS. ARGENTIERI: -- I don't want to reargue it but
25 the testimony -- her testimony was that the other lawyer

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1 received the threats. And if Mr. Ricco wanted to clarify that
2 with her and ask her, Mr. Kluger, since -- he could have and he
3 didn't and that's fine. Maybe that was strategic, maybe it
4 wasn't; I don't know.

5 But the point is that both sides were making fair
6 arguments based on the record which is the evidence and not
7 only did the Court say that lawyer's arguments aren't evidence,
8 we said it in both of our arguments. I think that this is a
9 meritless application. I don't think that there's a reason to
10 give an additional instruction at this point.

11 The cases that Mr. Ricco cited, really there were --
12 something extraordinary happened. This is nothing
13 extraordinary. We literally put up the transcript and made a
14 fair argument from it and I think that at this point, really
15 nothing should be done to call their attention to it in any
16 way. They've asked for -- we now know what they're asking for.

17 THE COURT: I'm not --

18 MS. ARGENTIERI: They've asked for all of her trial
19 testimony and we should prepare it and send it back to them and
20 allow them to continue deliberating.

21 THE COURT: Well, Mr. Ricco's proposed charge seems
22 to me to be totally innocuous.

23 MS. ARGENTIERI: But what --

24 MR. RICCO: And, Judge --

25 MS. SHIHATA: There was no prosecuting --

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1 THE COURT: I don't even know how it in any way hurts
2 you but --

3 MS. ARGENTIERI: But, it's just not -- Judge, it's
4 not necessary at this point. I mean he hasn't pointed --

5 THE COURT: Well, the fact that it's not necessary,
6 how are you prejudiced?

7 MS. ARGENTIERI: Because I think -- I mean the charge
8 that he proposed -- the instruction that he proposed in his
9 letter is a lot different than what he said just now which
10 sounded very general. I mean, so is the Court saying that
11 basically you would just say, I direct you to look at the
12 record and that transcripts are evidence?

13 THE COURT: Could you repeat -- I don't -- could you
14 just repeat what you just said? I mean, I didn't --

15 MR. RICCO: Judge, I thought -- I've been thinking
16 about this on the drive in and I don't want the Court to say
17 anything that would point to either me or the government --

18 THE COURT: Right, but --

19 MR. RICCO: -- I would just ask that the Court --

20 THE COURT: Could you repeat -- you just told me a
21 few minutes ago what you would want me to say. Why don't you
22 repeat it again?

23 MR. RICCO: I would ask the Court, as the jurors are
24 going to get a lot of transcripts this morning, just to remind
25 the jurors that during arguments, both attorney -- you know,

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1 the attorneys made references to the transcripts. However,
2 that's not evidence and that your --
3 (Counsel confer)

4 MR. RICCO: Judge, I would ask the Court to say that
5 -- take out the word evidence but just to say to the Court,
6 look, to the jurors, the transcripts are going back. During
7 arguments, there were many references to pages by the
8 attorneys. You have the transcripts. It's your obligation to
9 review the testimony of the transcripts and you make your
10 decision as to what facts you deem important to your
11 deliberations and resolve it accordingly.

12 MS. ARGENTIERI: Judge, it's not their obligation to
13 review the transcripts though. I think like they --

14 MR. RICCO: Take that work out.

15 MS. ARGENTIERI: They don't have to review anything,
16 if they don't want to.

17 MR. RICCO: But they're asking for it.

18 THE COURT: They're asking for it. They're obviously
19 going to review it.

20 MS. ARGENTIERI: But we can't tell them --

21 THE COURT: I don't under -- look, this is just
22 simply roughly a restatement of what I've already told them.

23 MR. RICCO: Yes, Judge.

24 THE COURT: I don't see any -- if you could tell me
25 how you're prejudiced, you know, I will listen but I don't see

1 how you're prejudiced.

2 MS. ARGENTIERI: Because, Judge, I think saying that
3 they have to read all of Maria's testimony, if they don't want
4 to, is inappropriate. Can you just reread the part of the
5 charge where you say lawyer's arguments aren't evidence. The
6 evidence is your recollection and the transcripts? Why isn't
7 that just sufficient?

8 MR. RICCO: Judge, I didn't ask for the Court to
9 focus in on --

10 THE COURT: I thought that was what he was basically
11 restating it. I mean, you know, the trouble with lawyers is
12 that they read every word and they attach significance to it
13 that, you know, an ordinary layman wouldn't necessarily do
14 that.

15 MR. RICCO: Right. And I am not asking the Court --

16 THE COURT: I don't know that his proposed charge is
17 anything more than what I've already told them.

18 MR. RICCO: It isn't, Judge.

19 MS. ARGENTIERI: It is.

20 MR. RICCO: And I would ask that the Court give a
21 generic charge since the jurors are asking for the transcripts.

22 THE COURT: Well, you know what? I will be there
23 within ten or 15 minutes. You write it out. This is not a
24 reason for me to -- we could hold Maria's testimony for that
25 period of time. I told them that we wouldn't necessarily be

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1 sending it all in immediately and I will deal with it when I
2 get in there. I'll be in there ten or 15 minutes.

3 MR. RICCO: Okay, thank you, Judge.

4 THE CLERK: So, Judge, I can send in Danilda's
5 testimony and Exhibits 225 and 226?

6 THE COURT: Yes. Is that all right?

7 MR. RICCO: Yes, it is, Judge. I have no objection
8 to those transcripts going in and Judge, just so you know for
9 the record, Mr. Martinez has been present for most of this
10 argument and he has no objection to us proceeding in this way,
11 isn't that correct?

12 THE DEFENDANT: That's correct, no objection.

13 MR. RICCO: Thank you, your Honor.

14 THE COURT: Okay.

15 MR. RICCO: All right.

16 (Pause)

17 THE CLERK: Counsel, in case you're keeping track of
18 Court Exhibits, Mr. Ricco's initial email to me this morning
19 was marked Court Exhibit 17. His follow-up letter, Court
20 Exhibit 18. You know that the juror's last note is Court
21 Exhibit 19. The government's response that was email to me is
22 now Court Exhibit 20 and I understand there's another jury
23 note.

24 MR. RICCO: Thank you.

25 (Court's Exhibits 17, 18, 20 were marked for identification, as

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1 of today's date)

2 MS. SHIHATA: Paula, can we get copies the note?

3 MR. RICCO: Paula, I'm going to be right outside.

4 THE CLERK: Go ahead.

5 MS. SHIHATA: Can we get copies of the notes?

6 THE CLERK: The note, sure.

7 (Pause)

8 THE CLERK: And Pappadio. Carlos, go get Tony for
9 me?

10 THE CLERK: The judge is on his way in. Don't send
11 him down yet.

12 THE MARSHAL: How long is that going to be?

13 THE CLERK: When he gets here, he gets here.

14 THE MARSHAL: No, I understand.

15 THE CLERK: I don't know.

16 THE MARSHAL: Do I have time to go downstairs and
17 come back up one minute?

18 THE CLERK: By yourself? Yes, I think so.

19 (Pause)

20 THE CLERK: They also want Nicole Pappadio.

21 MR. RICCO: Okay. And I have no objection to that
22 once we get it together. Okay, great. Let me get to that.
23 We've got to move.

24 (Pause)

25 THE CLERK: And I need Danilda's testimony.

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1 MR. RICCO: Do you have Danilda's yet?

2 MS. ARGENTIERI: We're waiting for Mr. Ricco to
3 review it.

4 THE CLERK: No, I know.

5 MS. ARGENTIERI: Okay.

6 (Pause)

7 THE CLERK: Counsel, I am going to give you copies of
8 these jury notes. On Court Exhibit Exhibit 19, I am going to
9 mark the Osoria testimony 19-A and note that that and the Court
10 Exhibits that were requested are going back but not Maria's
11 testimony.

12 MS. SHIHATA: Sorry, which exhibit testimony?

13 THE CLERK: We've already got them.

14 MS. SHIHATA: Okay.

15 THE CLERK: I am just waiting on Danilda's testimony.

16 MR. RICCO: Paula, I'm right outside.

17 THE CLERK: And you're both okay with Pappadio?

18 MS. ARGENTIERI: Yes.

19 MR. RICCO: Yes.

20 THE CLERK: Okay.

21 (Counsel confer)

22 THE CLERK: Okay. We need the little sticky notes?

23 MR. SANTIAGO: Oh, these are the -- where the
24 signatures are, where the corrections are.

25 THE CLERK: Okay.

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1 MR. SANTIAGO: What the correction is and then the
2 signature.

3 THE COURT: Lauren, did you make note of those for
4 your corrections?

5 MS. ARGENTIERI: Yes. After the break, can we look
6 at it?

7 THE CLERK: Yes.

8 MR. SANTIAGO: Do you want me to just them here?

9 THE CLERK: Yes, because I have to pull those out
10 before I send them back.

11 (Pause)

12 THE CLERK: Carlos, come initial this for me, one of
13 you too. This one and this one. 21-A. Her testimony is 21-A
14 going in. Just initial below that and initial below here.
15 Nicole or Nadia, I just need a signature here.

16 MS. ARGENTIERI: Oh, I'm sorry.

17 MR. SANTIAGO: 21 and -- what's 21 again? 21 is --

18 THE CLERK: And 21-A is the testimony that's being
19 marked to go in.

20 MR. SANTIAGO: Oh, okay. I understand.

21 MS. ARGENTIERI: Do I have to initial the note?

22 THE CLERK: Yeah, underneath my notation.

23 MS. ARGENTIERI: Do you want me to do this one, too?

24 THE CLERK: Yeah, please because that's going back
25 without Maria. Thank you.

1 (Pause)

2 THE CLERK: And, Carlos, did you check these for me?
3 Those are the other exhibits that they asked for. I just want
4 to confirm before they go in, 225 to 226.

5 MR. SANTIAGO: Oh, yes. Yep.

6 THE CLERK: Okay. Thank you. And Pappadio --

7 MR. SANTIAGO: That's not 19, correct? That's not
8 19.

9 THE CLERK: Yes. And I am just going to let them
10 know verbally that we're working on the other transcripts.

11 (Recess from 10:50 a.m., until 11:07 a.m.)

12 THE CLERK: Counsel, come up please.

13 MR. RICCO: Good morning, Judge Korman. Judge, we --

14 MS. ARGENTIERI: Good morning.

15 MS. SHIHATA: Good morning.

16 MR. RICCO: We think we might have some language that
17 we --

18 THE COURT: I thought I wouldn't have to rush.

19 MS. ARGENTIERI: What did you say?

20 THE COURT: I thought I wouldn't have to rush.

21 MS. ARGENTIERI: Me, too. Me, too. He said I
22 thought I wouldn't have to rush. I said I thought I was going
23 to get to read the newspaper, but --

24 MR. RICCO: Oh, me, too, Judge.

25 MS. ARGENTIERI: -- not.

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1 MR. RICCO: But, you know, it's what we do. I will
2 wait until you get up.

3 Judge?

4 THE COURT: Yes.

5 MR. RICCO: I think we might have agreed on some
6 language.

7 THE COURT: Oh, good.

8 MR. RICCO: And I'm just going to make it big.

9 MS. ARGENTIERI: That would be good.

10 MR. RICCO: Okay. It says, Judge, You have requested
11 transcript and they are being or --

12 MS. ARGENTIERI: I mean, both, right?

13 MR. RICCO: Okay. They have been -- and they have
14 been provided for you to assist in your review of any witness'
15 testimony. During arguments, attorneys for both sides may have
16 made arguments and comments about witness testimony. I will
17 remind you that the lawyers' arguments or comments are not
18 evidence. That's taken from your instruction.

19 However, it is your recollection of the testimony
20 which controls and the transcripts are provided to assist you
21 and the words from your instruction in deciding what the facts
22 are. If the Court can provide additional assistance, please
23 notify by way of a note.

24 THE COURT: I take it this isn't written out
25 anywhere.

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1 MR. RICCO: It's on the computer screen, Judge. I
2 can --

3 THE CLERK: Tony, why don't you email that to me and
4 I'll print out a copy.

5 MR. RICCO: Okay. Judge, I will just take a second.
6 (Pause)

7 THE COURT: By the way, while we're waiting, I
8 assume, you have gone through the transcripts to make sure
9 they're accurate.

10 MS. ARGENTIERI: Yes, Judge.

11 THE COURT: Besides from the fact that -- I mean,
12 they're transcribed with the notion that they'll be sent into
13 the jury room, so all of the objections and other things that
14 shouldn't go are easily removable but sometimes there are
15 errors --

16 MS. ARGENTIERI: Yes.

17 THE COURT: -- in the testimony and the way they're
18 transcribed.

19 THE CLERK: I have almost all of them, Judge.

20 THE COURT: All of what?

21 MS. ARGENTIERI: The transcripts.

22 MS. SHIHATA: We've reviewed the with defense counsel
23 to make changes -- corrections.

24 (Counsel confer)

25 MR. RICCO: Judge, I sort of made the language big,

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1 so we can look at it while it's being printed.

2 THE COURT: You couldn't make this smaller?

3 MR. RICCO: My eyes are terrible.

4 THE COURT: I could barely read it.

5 MR. RICCO: I could barely read it, too. I could
6 make that print bigger.

7 THE COURT: No, I can read it.

8 MR. RICCO: And, Judge, I just also wanted to add
9 that we've -- there's students here from the Fordham Law
10 School, my class, assisted in crafting the instruction and
11 they're present in the first row.

12 THE COURT: Okay, good.

13 (Pause)

14 MR. RICCO: Judge, the government was suggesting
15 changing comments to statements and I don't have a problem with
16 that.

17 (Pause)

18 THE COURT: All right. I don't know, I will give it
19 -- since you're agreed, I hate to --

20 MR. RICCO: Judge, I don't think either side has any
21 objection to modifying that.

22 THE COURT: No, I just think it's awkward to say your
23 recollection of the testimony which controls, since I am
24 sending in transcripts of the testimony but it doesn't matter.
25 This is much ado over nothing.

Proceedings

1133

1 MR. RICCO: Okay.

2 THE COURT: Bring in the jury.

3 THE CLERK: Yes, Judge.

4 MS. ARGENTIERI: Judge, would you consider changing
5 the word comments to statements?

6 THE COURT: Yes.

7 MS. ARGENTIERI: Okay, thank you. Thanks so much.

8 MR. RICCO: Thank you.

9 (Pause)

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Proceedings

1134

1 THE CLERK: All rise.

2 (Jury enters courtroom.)

3 THE CLERK: Please be seated.

4 THE COURT: Ladies and gentlemen, you've asked for
5 transcripts this morning. We've sent some of them into you.
6 Maria's is not ready yet. It should be ready momentarily.

7 What I wanted to tell you is that they're being
8 provided -- I am just reminding you of what I believe I've
9 already said, that they're being sent into you to assist your
10 review of the witness' testimony and that during arguments for
11 attorneys -- during arguments, attorneys for both sides may
12 have made arguments and statements about what the witness'
13 testimony was. I remind you again, as I did earlier, that the
14 lawyers' arguments or statements are not evidence. It is your
15 recollection of the testimony which controls and the
16 transcripts are provided to you in order to assist you in
17 deciding in what the facts are.

18 And if I can provide any additional assistance,
19 you'll notify me by way of note. And I expect within 15
20 minutes, Maria's testimony will be ready.

21 I should say when I say ready, it's here but
22 sometimes there are mistakes made in transcriptions and before
23 we send it into you, we like to review it, so that the mistakes
24 in the transcription are correct. That that's what takes so
25 long. So you'll have it shortly. Okay.

Proceedings

1135

1 THE CLERK: All rise.

2 (Jury exits courtroom.)

3 THE CLERK: Please be seated.

4 MS. ARGENTIERI: Thank you.

5 MR. RICCO: Thank you, Judge.

6 THE COURT: Thank you.

7 (Recess from 11:20 a.m. until 2:57 p.m.)

8 MR. RICCO: Judge, if we could have just a quick
9 minute.

10 THE COURT: Okay.

11 Basically, you operate -- I don't mean you
12 personally, the but the U.S. Attorney's Office operates on the
13 presumption that because juries on rare occasion act
14 irrationally they always will.

15 MS. ARGENTIERI: Having suffered once through a very
16 irrational jury, it's very, very painful when it happens and so
17 you just want to make sure.

18 THE CLERK: Judge, for the record 19B went into the
19 jury, which was Maria's testimony.

20 Court Exhibit 21 is jury note for requesting
21 Pappadio. 21A is the transcript that went into the jury.

22 Court Exhibit 22 is jury note 5 requesting Lopez.
23 22A was the Lopez transcript.

24 Court Exhibit 23 was jury note 6 asking for a number
25 of exhibits, one of which was not in evidence, no. 224.

Proceedings

1136

1 Counsel agreed that I could verbally advise the jury
2 that that individual exhibit is not in evidence and was not
3 sent in. Counsel signed that jury note.

4 And Court Exhibit 24 is jury note 7, which is before
5 the court now.

6 Is that right, counsel?

7 MS. ARGENTIERI: Yes. Yes.

8 So, Judge, we've received the --

9 THE COURT: Did you read that note into -- the text
10 of the note? Did you read the text of the note?

11 THE CLERK: No, I did not. I'm sorry.

12 The last jury note, which has been marked Court
13 Exhibit 24 reads, "Page 19, jury instructions, Count 3, 7, 11,
14 15, 19. Indictment says by threatening and play Jane Doe in
15 fear. Jury instructions page 20, 'Third, threatening or
16 placing in fear.' Question: do we need to determine just one
17 or both, both threat and fear?"

18 (Pause.)

19 THE COURT: I'm just looking at the wrong page. My
20 instructions are in larger type and --

21 MS. ARGENTIERI: Here, Judge.

22 MR. RICCO: They're on page 20 on the regular --

23 THE COURT: I know, but --

24 MS. ARGENTIERI: Judge, we'll hand up our copy.

25 So, Judge, obviously, you probably know better than I

Proceedings

1137

1 do that the U.S. Attorney's Office practice is to charge things
2 in the conjunctive to avoid claims that indictments are
3 duplicitous.

4 I think it's our position, and I think Tony Ricco's
5 going to agree with us, that it's an or, but whichever one they
6 find, or if they find both, that they have to unanimous. We
7 believe that that's what they should be instructed.

8 And to the extent that you find that persuasive, I'm
9 also reading it in the Gleason book, but I know that that's our
10 --

11 THE COURT: Well, that's an accurate statement of the
12 law, except the indictment just says fear.

13 MS. SHIHATA: No, it doesn't, Your Honor. It says
14 both.

15 THE COURT: I'm looking at -- unless I'm not looking
16 at the right count.

17 MS. SHIHATA: If you're looking at the --

18 THE COURT: Oh, yes. I'm sorry. You're right.
19 That's correct, provided they're unanimous as to which one.

20 MS. ARGENTIERI: Okay. So, Judge, are you going to
21 bring them out and --

22 MR. RICCO: Something happened?

23 MS. ARGENTIERI: He said that that was correct.

24 MR. RICCO: Oh, yes. Let me --

25 MS. ARGENTIERI: Okay. Sorry. I didn't mean to cut

1 you off --

2 MR. RICCO: Judge, I just wanted to put my thinking
3 about this on the record and that is that we prepared for our
4 summation based upon the court's instructions as proposed,
5 which I believe reflected the law.

6 So we were not prejudiced in terms of our
7 preparation, or the arguments that we presented, because we
8 based that on our understanding of what the law is, as
9 reflected in the court's instruction. Otherwise, we would have
10 objected to the court's instruction, which we did not, because
11 we believe that it was a fair assessment of what the law is.

12 MS. ARGENTIERI: Okay.

13 THE COURT: Okay.

14 MR. RICCO: That's why I -- I get there on a
15 different road, but I'm at the same place.

16 MS. ARGENTIERI: Okay.

17 THE COURT: Okay. So what I'm going to answer the
18 jury is that they can determine -- they do not have to
19 determine both. It could be threat or fear, but whichever one,
20 or both for that matter, they have to agree unanimously.

21 MS. ARGENTIERI: Perfect. That seems fair.

22 MR. RICCO: All right. I agree with that.

23 MS. ARGENTIERI: Thank you, Judge.

24 MS. SHIHATA: Thank you, Your Honor.

25 THE CLERK: And, Mr. Ricco, getting back to Court

Proceedings

1139

1 Exhibit 23, you asked that I remind you to advise your client
2 about --

3 MR. RICCO: Oh, yes. Thank you.

4 (Counsel and defendant confer.)

5 MR. RICCO: And Mr. Martinez was okay with the way in
6 which we resolved note number --

7 THE COURT: 23.

8 MR. RICCO: 23. Thank you.

9 (Jury enters.)

10 THE CLERK: Please be seated.

11 THE COURT: Ladies and gentlemen, you know, I
12 discussed your note -- I have to discuss all notes with counsel
13 before I answer them.

14 I discussed your note, but I just thought of
15 something that I wanted to raise with them at the sidebar, so
16 it will just take me a minute.

17 (Sidebar conference.)

18

Sidebar

1140

1 (Sidebar conference.)

2 THE COURT: Your statement is a correct statement of
3 the law, but it occurred to me that the answer may depend on
4 the verdict. We have to determine what about -- obviously, in
5 order to convict they only have to determine one.

6 MR. RICCO: And we need to know which one.

7 THE COURT: Well, I mean, in other words, in order to
8 convict -- they can convict on one or the other.

9 MS. ARGENTIERI: Yes.

10 THE COURT: But what if they acquit on one? I mean,
11 I -- then they have to go on and determine the other.

12 In other words, let's say that with respect to threat
13 they say there was no threat. So then they have to -- they do
14 have to go on to determine fear.

15 MS. ARGENTIERI: Yes.

16 MS. SHIHATA: I think that's what we were saying,
17 Judge.

18 THE COURT: No, I understand that but what I simply
19 proposed to say was that they don't have to determine both. It
20 could be threat or fear, as long as one be unanimous. But that
21 assumes that the verdict is guilty.

22 MS. SHIHATA: I think if you could state --

23 THE COURT: In other words, suppose they found no
24 threat. Then they have to -- they do have to deal with fear.

25 MS. SHIHATA: But, Judge, you could -- I think you

Sidebar

1141

1 could permeate that by saying in order to find the defendant
2 guilty of this count you must find either threat placing in
3 fear, or both, and as to whichever one, you must be unanimous.

4 THE COURT: Well, that's in addition to what I was
5 going to say.

6 In other words, you want me to say in order to find
7 the defendant guilty --

8 MS. SHIHATA: Yes. I think that -- sorry.

9 MR. RICCO: Do you have a verdict form around?
10 Because it needs to -- we need to (indiscernible) on the
11 verdict form.

12 Well, I think that we have a verdict form that
13 accurately records what they find unanimously.

14 MS. ARGENTIERI: I don't think you need a special
15 interrogatory for this. This happens -- it's not -- you know,
16 we do that when it's like an *Apprendi* factor or whatever. We
17 just tell them that they have to be unanimous, and then they
18 check it off. There's no need for a special --

19 MR. RICCO: I don't make objections based on what
20 people do in other cases. A lawyer in this case didn't file an
21 objection and his politician went to jail, and the other
22 lawyers in another district did, and they got new trials.

23 I believe that what we need to do is simply amend
24 this verdict form so that we clearly know what theory that he
25 was unanimously convicted on.

Sidebar

1142

1 I'm not asking for any special interrogatory --

2 THE COURT: It assumes that there's a conviction.

3 MR. RICCO: Yes. Right.

4 MS. SHIHATA: I think what Mr. Ricco --

5 THE COURT: Look. It's a complicated

6 (indiscernible). I'm just dealing with this in a habeas corpus

7 case (indiscernible).

8 The Supreme Court has held that where two offenses

9 are charged in the alternate, the count can stand as long as

10 there's evidence to support one count, even if you don't know

11 which one.

12 MS. ARGENTIERI: That's right.

13 THE COURT: But I would be charging them in order to

14 find the defendant guilty --

15 MS. SHIHATA: Normally a special interrogatory is

16 after the guilt is found. If you found him guilty, specify,

17 for example, drug amount, or whatever, an *Apprendi* factor.

18 Given the law, I don't think a special interrogatory

19 is necessary, as long as the instruction is correct.

20 THE COURT: Well, it wouldn't be an abuse of

21 discretion to give a special interrogatory, but the truth of

22 the matter is, Mr. Ricco, is that I don't see any difference.

23 I mean, there's obviously a legal difference, but I'm talking

24 as a practical matter, I don't see -- I don't see that there's

25 any --

Sidebar

1143

1 MR. RICCO: If at the end of the day the Supreme
2 Court is -- this case would be decided by the circuit. And the
3 way in which the Supreme Court has resolved these issues, a lot
4 of briefing time and argument time would be spared if the
5 verdict form in advance of this properly indicates the theory.

6 So I'm requesting that it be done and if the court
7 does it without it, it's one of the those issues that some
8 other lawyers will argue some day that the Supreme Court was
9 wrong as applied to this particular case.

10 So I'm --

11 MS. ARGENTIERI: Judge, I think it would over
12 complicate the form and I think that --

13 THE COURT: Well, what over complicates this case, I
14 told you is you feel the necessity to throw in everything.

15 MS. ARGENTIERI: I know, Judge, but I don't think
16 that the special interrogatory that Mr. Ricco's asking for is
17 appropriate given the state of the law as you said it.

18 And I think that if the court gives the instruction
19 that we all agreed on, they can find whichever theory they need
20 to be appropriate and I think that you're right that as long as
21 there's evidence of whichever one they convict, if they
22 convict, in the record that will be the basis for any appeal.

23 And I don't --

24 MS. SHIHATA: To resolve any appeal.

25 MS. ARGENTIERI: To resolve any appeal. And I don't

Sidebar

1144

1 think more -- and cases like this -- and I know you don't want
2 talk about other cases, but we charged things in conjunctive
3 where conduct -- where different types of conduct are charged
4 in the same count all the time.

5 And if we broke that into an interrogatory every
6 time, jury sheets would be endless.

7 MR. RICCO: Yeah, but we're not talking about those
8 cases. We're talking about what's the right thing to do in
9 this case and this is the way you charged the case out with all
10 of these different counts.

11 And how are you prejudiced at all by the jury clearly
12 indicating to the court which one of these alternative theories
13 was accepted beyond a reasonable doubt.

14 I don't think that you can -- on -- pleaded an
15 indictment like this and then say well, if you kind of give it
16 some understanding it makes it complicated.

17 MS. SHIHATA: That's not my argument. The state of
18 the law is clear on this.

19 MS. ARGENTIERI: Judge, for the reasons you just
20 stated, it's really not appropriate and I think if we decide
21 every single issue with what exactly is the prejudice
22 requirement, all sorts of things would be happening.

23 And I think, you know, Mr. Ricco has made his
24 objection and it's contrary to the law that Your Honor cited.

25 MR. RICCO: See, Judge, I think my position is --

Sidebar

1145

1 actually, Judge, I think my position is consistent with the
2 law. It's not contrary. Excuse me. Come on. We're
3 professionals here. Come on. My belief is that it's
4 consistent with it.

5 And I don't -- the exercise of the discretion is
6 there to ensure --

7 THE COURT: You know I don't want to send in another
8 verdict sheet.

9 You know what I'm tempted to do in order to make you
10 happy is simply to -- after I give them that instruction is to
11 indicate on the verdict sheet which particular one they found;
12 threat, fear, or both.

13 MS. ARGENTIERI: Okay.

14 MR. RICCO: And that way they don't get another form.

15 MS. ARGENTIERI: Okay.

16 MR. RICCO: (Indiscernible) this jury is writing
17 these notes will not have a problem indicating --

18 MS. SHIHATA: Okay. We're fine with that.

19 (End sidebar conference.)

Proceedings

1146

1 THE COURT: Ladies and gentlemen, I have your note,
2 which reads as follows. It directs me to page 19 and it says
3 "Jury instructions Counts 3, 7, 11, 15 and 19 of the indictment
4 says 'by threatening and placing Jane Doe in fear.'"

5 On the other hand you indicate my jury instructions
6 on page 20 says, "Threatening or placing in fear." And you ask
7 "Do we need to determine just one or both?"

8 Without in any way assuming what you're doing, I'm
9 just going to answer your question as a theoretical matter.

10 In order to find the defendant guilty you have to
11 find either threat or fear, but not both.

12 But I would appreciate it, if it doesn't create too
13 much confusion, that maybe you could write in -- if it's one or
14 the other, or both, if you would write in on the verdict sheet
15 for these counts when you put -- whichever box you check, you
16 indicate -- in other words, if -- and I'm not suggesting you're
17 going to do this, but I have to say it -- if you're going to
18 find the defendant guilty of a particular count on one or two
19 of these, if you just put in parentheses whether it was fear or
20 threat, or both.

21 But I'm not suggesting -- by answering your question
22 I'm not suggesting that you do anything in terms of the
23 verdict. I'm just trying to answer your question correctly.

24 MS. SHIHATA: Judge, can we just have a sidebar?

25 MS. ARGENTIERI: You need unanimous. Unanimous.

Proceedings

1147

1 THE COURT: Oh, I'm sorry.

2 Whichever one, if it's one or the other, you should
3 be unanimous. In other words you have an option of one -- or
4 only one, or both. But if it's -- whichever one it is, you
5 should be unanimous. It can't be six on one count and six on
6 the other if you know what I mean. Okay.

7 (Jury exits to continue deliberations.)

8 THE COURT: All right. The record should reflect
9 when I asked the jurors if you know what I mean, they all shook
10 their heads yes.

11 (Recess from 3:20 p.m. until 6:00 p.m.)

12 THE CLERK: Please be seated.

13 Judge, there have been three jury notes.

14 Court Exhibit 25, the jury asked to see me in the
15 jury room. Counsel said that was fine. They wanted their
16 certificates of attendance, which they've asked for previously
17 and they've been given those.

18 Court Exhibit 26 they requested Kiara testimony and
19 Melva testimony. Court Exhibits 26A and 26B went back to the
20 jury with counsel's approval.

21 And the last note is Court Exhibit 27, "We want to
22 end here for the day and continue deliberating." Counsel has
23 seen the note.

24 MR. RICCO: And, Judge, just one addition. Mr.
25 Martinez has no objection to Paula going into the jury room to

Proceedings

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1 give them their certificates of attendance.

2 THE CLERK: Thank you.

3 THE COURT: All right.

4 THE CLERK: All rise.

5 (Jury enters.)

6 THE COURT: All right. Ladies and gentlemen, I have
7 your note that you'd like to adjourn for the day, so I'm going
8 to send you home until tomorrow at 10 o'clock.

9 I'm going to remind you I have no alternates, so you
10 all have to be here and, again, please do not talk to anyone
11 about the case, your deliberations and stay away from the
12 internet.

13 Okay. Good night.

14 (Jury exits)

15 THE COURT: Okay. See you all tomorrow.

16 MR. RICCO: Thank you.

17 MS. ARGENTIERI: Thank you.

18 (Proceedings adjourned at 6:04 p.m.)

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1 I, LINDA FERRARA, Certified Electronic Transcriber,
2 certify that the foregoing is a correct transcript from the
3 official electronic sound recording of the proceedings in the
4 above-entitled matter.

5
6 

7 January 18, 2018

8 Linda Ferrara, CET
9
10

11 I, CHRISTINE FIORE, Certified Electronic Court Reporter
12 and Transcriber, certify that the foregoing is a correct
13 transcript from the official electronic sound recording of the
14 proceedings in the above-entitled matter.

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16 

17 January 18, 2018

18 Christine Fiore, CERT-410
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